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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEONARD GABRIEL RINCON, Defendant and Appellant.	B217776 (Los Angeles County Super. Ct. No. KAO83539)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Affirmed.

Trisha Newman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael Johnsen, Lauren E. Dana and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Leonard Gabriel Rincon of possession of heroin for sale. On appeal, he contends, first, that based on an error in the expert's testimony there was insufficient evidence to show he possessed the heroin for sale; and, second, that the admission of certain evidence concerning narcotics sales at defendant's home resulted in an unfair trial and in a denial of his due process rights under the Confrontation Clause of the federal Constitution. We disagree with these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution case.*

On June 11, 2008, Detective Mark Stonich went to defendant's home, having received information that someone was selling drugs at that location. Defendant was on active parole for possession of a controlled substance. Defendant's mother, Celia Rincon, answered the door and took the detective to defendant's room. Defendant was not home. Inside a tape player in defendant's room another detective found a plastic bag containing five balloons of heroin. They did not find any paraphernalia to smoke or otherwise to use the heroin. They did not find extra balloons or baggies, scales, pay/owe sheets, weapons or cash in his room.

Rincon told Detective Stonich that she had accused defendant of selling drugs a couple of days ago.[1] She wasn't certain he was selling drugs, because she had never caught him "red-handed," but in the past couple of weeks, three to four cars, including a van, came by every morning. People didn't get out of the cars; they called Rincon, who went out to them. Defendant told her he wasn't selling drugs. But in her heart, she believed he was selling drugs. At trial, Rincon backed away from these statements, saying she believed that defendant was only using drugs, not selling them, and she couldn't remember how many cars came to the house but they didn't come every day.

[1] A portion of Celia Rincon's conversation with Detective Stonich was recorded and played for the jury.

The detectives were leaving when they saw defendant outside. They arrested him. When the detective told defendant what had been found in his room, defendant said that the drugs were for his personal use only and he denied selling them. He explained that the people who came by his house were offering him work, but he did not take the jobs, although he was unemployed. The detective did not see needle or track marks on defendant's forearms, legs and neck—the areas his clothes didn't cover.

The substance found in defendant's room was tested and found to be heroin. According to the criminalist who tested the drugs, two of the five balloons had a net weight of 0.5 grams[2] of heroin and the remaining three balloons had a total gross weight of 1.69 grams.

In Detective Stonich's expert opinion, the drugs were possessed for sale. He based his opinion on Rincon's statements that defendant might be selling drugs and information he received that there was narcotics activity at the house, the amount of heroin recovered, the lack of drug paraphernalia and that cars were coming three to four times a day, usually in the morning ("[h]eroin is notoriously a morning drug"). Defendant's explanation for the traffic didn't make sense. Defendant also said he'd bought a necklace for his mother, so the detective wondered where he got the money. Defendant also told the detective that he didn't inject heroin; he heated it on a spoon and squirted the liquid up his nose. The detective had never heard of this way of taking heroin. The balloons were worth $10 to $20, and were packaged in amounts indicating sale.

The detective also testified that the heroin weighed 2.21 grams. The average dose of heroin is .05 grams, and dividing 2.21 by that equals a little over 44 doses. The heroin high could last four to six, and sometimes eight, hours. If a person used heroin 24 hours a day (assuming no sleep) they would be on heroin for nine days straight with this amount.

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[2] The criminalist testified that the two balloons had a total net weight of 0.5 grams. But when he was immediately thereafter asked if he came to the conclusion that the two balloons contained ".52" grams of heroin, he agreed.

B. *Defense case.*

Defendant testified. He had been using heroin for the past 25 years (he was 48 at the time of trial). He took it in several ways: with a syringe, snorted it, "muscle[d]" it (injected it directly into a muscle), or melted it and let it drip down his nose. He kept his socks in a laundry basket in the closet, and that was where he kept tools to use the heroin.

The five balloons of heroin were for his personal use. He used three balloons of heroin in the morning. He did not sell heroin. Friends came by the house in the morning looking for work and there was also a green church van that came by with people who were trying to get him to go to church.

He had been convicted of attempted robbery and of petty theft with priors.

II. Procedural background.

On July 8, 2009, a jury found defendant guilty of possession of heroin for sale (Health & Saf. Code, § 11351). After a court trial at which allegations of priors were found true, the trial court sentenced defendant to three years, doubled under the Three Strikes law (Pen. Code, §§ 667, subd. (b), 1170.12, subds. (a)-(d)) to six years, plus three years for each of three priors under Penal Code section 667.5, subdivision (b), for a total of nine years.

DISCUSSION

I. Sufficiency of the evidence.

Detective Stonich based his opinion that defendant possessed the heroin for sale on, in part, the amount of heroin in the five balloons, which he said was 2.21 grams.[3] The detective, however, was incorrect: two of the five balloons contained a *net* amount of .5 grams of heroin and the three remaining balloons had a *gross* weight (balloon plus contents) of 1.69 grams. The total net weight of heroin was never calculated. Because of this error, defendant now contends that the evidence was insufficient to support the judgment. We disagree.

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[3] During closing argument, the prosecution repeated that the "total weight" of the balloons was 2.21 grams.

Under a sufficiency of the evidence standard of review, we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) Reversal is not warranted unless it appears that there is no hypothesis on which there is sufficient substantial evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The elements of a Health and Safety Code section 11351 violation are: (1) defendant exercised dominion and control over the controlled substance; (2) the defendant was aware that he was in possession of a controlled substance; (3) the defendant was aware of the nature of the controlled substance; (4) the controlled substance was in an amount sufficient to be used for sale or consumption as a controlled substance; and (5) the defendant possessed a controlled substance with the specific intent to sell it. (*People v. Parra* (1999) 70 Cal.App.4th 222, 226.)

Defendant here argues that there was insufficient evidence he possessed the heroin for sale because Detective Stonich based his opinion on a miscalculation of the net weight of the heroin. There is no dispute that the detective improperly added the net weight of two balloons to the gross weight of the remaining three balloons to come up with an incorrect total "net" weight of 2.21 grams. This error was not caught by either the prosecutor or by defense counsel, although we cannot rule out the possibility that the jury caught the error in the detective's testimony about the total net weight of the heroin.

But even assuming they didn't, the amount of the drugs was not the only evidence on which the detective based his opinion that defendant possessed the drugs for sale. (Cf. *People v. Peck* (1996) 52 Cal.App.4th 351, 357 [expert opinion that marijuana was possessed for sale was based on the quantity of marijuana, i.e., 40 pounds]; *People v. Parra, supra,* 70 Cal.App.4th at p. 225 [opinion that cocaine was possessed for sale was based in part on large amount of cocaine, over one kilogram].) The expert here, Detective Stonich, based his opinion on matters other than just the amount of heroin.

(See, e.g., *People v. Newman* (1971) 5 Cal.3d 48, 53, ["In cases involving possession of marijuana or heroin, experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld"], disapproved on another point in *People v. Daniels* (1975) 14 Cal.3d 857, 862.)

There was evidence that people were coming to the house to buy drugs. Celia Rincon told the detective that three to four cars came by the house in the mornings. People never came inside the house; instead, they called defendant from a cell phone and he would go outside for a brief time to see them. When the detective asked defendant about this, he didn't deny that cars came by. Instead, he offered an implausible explanation that his friends were coming by in relation to finding work, but he declined the jobs, although he was unemployed. And although Rincon later backed away from her statements to the detective, she initially said that she believed her son was selling drugs. Also, defendant had no fresh visible needle or track marks. Defendant explained that sometimes he melted the heroin and squirted it up his nose; but this was a way to ingest heroin that the detective had never heard of. No paraphernalia to use drugs was found in defendant's room.

Given this evidence, and in particular the evidence that cars came by in the mornings, there was sufficient evidence to support the judgment.

II. Admission of evidence that defendant sold narcotics at his home.

The trial court precluded Detective Stonich from testifying that he went to defendant's house because he received information that drugs were being sold at that location. The detective, however, on direct examination testified to this effect. Defendant contends that his Sixth Amendment confrontation rights were violated by admission of this testimony. We disagree.

A. *Additional facts.*

According to a police report, an anonymous, concerned neighbor reported that unknown persons would drive up to defendant's house, park, make a call from a cell phone, and then defendant would come out a few seconds later. Defendant appeared to hand the person something through the open window, and the car would drive away. Other people would knock on defendant's door and leave a few seconds after defendant had answered it. The neighbor knew that defendant had been arrested for drugs before.

The defense asked that anything the person said be excluded at trial, but the prosecutor argued that the anonymous report provided context for why the police were at defendant's home. The court said: "[E]ven though you would be introducing this evidence for a non-hearsay purpose, No. 1, to explain why the detective went to this house in the first place[,] [a]nd No. 2, as evidence of sales activity, which form the basis that the contraband was possessed for sales, the problem is that it does rely on inadmissible hearsay." The court found that there was an issue of reliability and the inability of the defense to cross-examine the anonymous witness. The trial court therefore ruled that the officer could testify why he went to defendant's house: based on information he received of narcotics activity at this house and after learning that defendant was on parole, he went to the house. The officer could not say he based his opinion that the narcotics were for sale on what the anonymous witness told him.

Thereafter, Detective Stonich testified as both a percipient and expert witness. On direct examination, he said that he went to defendant's house because he'd received information that someone at the house was selling narcotics. When listing the reasons for his opinion that the drugs were possessed for sale, he repeated that he'd received information that there was narcotics activity at the location.

At the close of direct examination, defense counsel moved for a mistrial based on the detective's testimony about receiving information about the sale of narcotics from defendant's home. The trial court responded: "I think I did indicate that the officer would be limited to . . . indicating that there was narcotics activity at the house. [¶] However, I think the added factor that there was sales activity at the house. [¶] I think

that is consistent with what the information that the mother provided as well because she does give the information that she observed these people coming to the house and under circumstances that could be interpreted as sales activity. [¶] I think on that basis, because it's not the officer's—isn't simply relying on the information provided by this anonymous informant or citizen informant, but also relying on the information that was provided by the mother. [¶] I think he should be allowed, because his opinion is based on that information that he's allowed to provide that in addition to narcotics activity. That it was narcotics sales activity." The court denied the mistrial motion, and defense counsel asked the court to admonish the jury.

The court admonished the jury: "You've heard testimony from this witness, who's testified to conversations that he's had with the mother and those conversations led him to believe that—well, those conversations involved activity at the house in which there was, what the mother had described, people coming to the house and so forth. [¶] At this point, that testimony is not being offered for its truth. [¶] In other words, it's not being offered to prove that there was sales activity at the house. [¶] The only reason it's being offered at this point is for the officer or the witness's opinion that there was sales activity at that house and that the heroin that was recovered at the house was possessed for sale. [¶] And you're only required to accept that testimony solely for that purpose and for no other reason. [¶] . . . Basically, the testimony that the officer's testified as to what the mother said is only being offered to because of the officer's giving the opinion that it was possessed for sale. [¶] And his opinion is based partially on that information that he received from the mother. [¶] And that's the only reason why it's admissible at this point."

During closing arguments, the prosecutor remarked on the bases for the expert's opinion that the defendant possessed the heroin for sale: "What's the basis for that opinion? What's the evidence he uses to support his opinion that the defendant possessed the heroin for sale? [¶] We have, first, the narcotics sales activity information that he received prior to going into the house. [¶] Remember early on Detective Stonich

testified he went upon the house, based on information received regarding narcotics sales activities at the house, also to conduct a parole search."

B. *Defendant's confrontation rights were not violated by admission of the expert's testimony.*

Defendant faults, first, the admission of the evidence and, second, the trial court's admonishment.

First, Detective Stonich testified that he went to defendant's house because he received information of narcotics sales and that he based his expert opinion that the heroin was possessed for sale on, in part, that same information. This testimony does appear to have violated the trial court's order. Still, we must question the validity of that order to determine whether any error occurred in admitting the evidence.

The trial court based its order on a finding that the anonymous neighbor's statements were inadmissible hearsay, unreliable, and defendant did not have an opportunity to cross-examine the neighbor. Presumably, the court was relying on *Crawford v. Washington* (2004) 541 U.S. 36, 68-69 (*Crawford*). *Crawford* held that out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant.[4]

Crawford's applicability to hearsay relied on by an expert in rendering his opinion was examined in *People v. Thomas* (2005) 130 Cal.App.4th 1202. There, a gang expert based his opinion that defendant was a gang member and committed the crime at issue for the gang's benefit on, among other things, conversations he had with gang members

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[4] Nontestimonial statements, however, do not implicate the Confrontation Clause. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822, fn. omitted [911 call made by domestic violence victim was not testimonial].) In contrast, a testimonial statement is one that is "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." (*Id.* at p. 826.)

that defendant was a gang member. (*Id.* at pp. 1206-1207.) The defendant contended on appeal that admitting hearsay evidence regarding the gang expert's conversations with other gang members violated his confrontation rights. Citing the long established rule that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources, including hearsay, on which they relied in forming those opinions, the court held that the Confrontation Clause was not violated by the expert's testimony about his conversations with other gang members. (*Id.* at p. 1209; accord, *People v. Ramirez* (2007) 153 Cal.App.4th 1422 [hearsay testimony about the facts of the predicate gang crimes was not made inadmissible by the Confrontation Clause]; *People v. Cooper* (2007) 148 Cal.App.4th 731 [expert could rely on videotaped interviews of victim in rendering opinion on the victim's mental competency without violating the Confrontation Clause]; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 56-57 [experts' testimony concerning defendant's past conduct that included witness's statements did not violate the Confrontation Clause].)[5]

We agree with *Thomas*. Experts may testify as to their opinions on relevant matters and may relate the information and hearsay sources on which they relied in forming those opinions. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619; Evid. Code, § 801, subd. (b) [an expert's opinion may be based on matter "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, . . ."].) Although the expert witness here was not a gang expert as in *Thomas*, the hearsay at issue is analogous to that in *Thomas.* The gang expert in *Thomas* relied on the statements of unidentified gang members in forming his opinion that defendant was a gang member. Detective Stonich similarly relied on the statements of an anonymous neighbor in forming his opinion that narcotics were being sold out of defendant's house. We therefore conclude that,

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[5] *Dungo* distinguished *Thomas.* (*People v. Dungo* (2009) 176 Cal.App.4th 1388 [98 Cal.Rptr.3d 702], review granted Dec. 2, 2009, S176886.) *Dungo* concluded that an expert could not rely on an autopsy report created by another doctor without running afoul of the Confrontation Clause. *Dungo* is currently on review before the California Supreme Court. (*People v. Dungo*, *supra*, [102 Cal.Rptr.3d 282].)

notwithstanding the trial court's initial order that the detective could not refer to the anonymous neighbor's statement that narcotics sales were occurring at defendant's house, the detective could rely on that statement in rendering his expert opinion that defendant possessed the heroin for sale.

This conclusion renders of little importance the trial court's failure to fully admonish that any conversations the detective had with others about drug sales at defendant's house were not being offered for their truth, but only as a basis for the expert's opinion that there was sales activity at the house. In any event, the jury was instructed, via CALCRIM No. 332, that: "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." The jury was therefore fully instructed how to evaluate a witness's opinion.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.